

Hon. David. B. Gass
Maricopa County Superior Court
East Court Building
101 W. Jefferson, Suite 914
Phoenix, Arizona 85041

Petitioner

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION FOR
AMENDMENTS TO ARIZONA
SUPREME COURT RULE 31**

Supreme Court No. R-__-__

**Petition to Amend Rule 31 of the
Rules of the Supreme Court of
Arizona**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petitions this Court to adopt amendments to Rule 31 of this Court's rules, as proposed in the attached Appendix A.

In Arizona's courts and other proceedings, the specters of legal fees or default judgments sink small business litigants before they even start. A longstanding-yet-convoluted Rule 31 prohibits them from representing their interests in most proceedings without the aid of an active State Bar of Arizona member. The rule has become exceedingly

protectionist and outmoded in certain respects. The law has evolved to favor corporate autonomy and to allow self-representation, including corporate self-representation. Targeted and narrowly tailored changes to Rule 31, Rules of the Arizona Supreme Court, would improve access to justice for small business litigants and would modernize the rule.

Rule 31 has, for more than three decades, set forth (a) this Court's jurisdiction over the practice of law, (b) the authority to practice law conferred only by active membership in the State Bar of Arizona, (c) the converse lack of authority had by those disbarred or inactive, and (d) exemptions from the general rule set forth in subsection (b) of the rule. Petitioner seeks to reorganize and reform those subsection (d) exemptions from the unauthorized practice of law (UPL) rule with the aims of promoting both access to justice and clarity.

The exemptions from Rule 31(d)'s ambit equal its rule number. What began as a simple prohibition on the UPL, has become a hydra. Despite its many exemptions, Rule 31 has not fully evolved to acknowledge the self-representation capabilities of Arizona's corporate entities.

Rule 31(d)'s current form fails to acknowledge the efficiencies to be

gained, and the access to justice granted, by allowing many corporate entities to represent themselves. The proposed changes streamline Rule 31(d)'s exemptions and promote efficiencies. Those changes align with (1) this Court's focus on increasing access to justice via clarified and simplified rules, (2) state and national case law on corporate autonomy, (3) the desire to lessen the burdens imposed by litigation on parties and courts, and (4) modern alleviation of once-legitimate concerns about the UPL by corporate entities. After discussing the proposed amendments, Petitioner will address those four aspects.

I. THE PROPOSED AMENDMENTS

Simply put, and respectfully, Rule 31(d) of this Court's rules is difficult to apply, administer, and comply with. Meanwhile, the era when small businesses could afford a lawyer to represent them in any number of proceedings is long past. In the interest of increasing access to justice for both individual Arizonans and the corporate entities in which they have elected to organize themselves, Petitioner seeks to simplify Rule 31. Petitioner also seeks to expand when corporate entities—other than those known as “issuing public corporations” under A.R.S. § 10-2701 (colloquially, publicly traded corporations)—might

represent themselves. Petitioner does not intend that anyone engage in the UPL but does intend to modernize and clarify its exemptions.

Petitioner proposes these intentions occur in the following ways:

- Reorganize the exemptions to Rule 31(d) into the following logical groupings, for ease of reading and application: general exemptions, including the new Rule 31(d)(9); administrative-proceeding-related exemptions; tax-related exemptions; and the probate, or fiduciary, exemption.
- Consolidate the corporate-self-representation-related exemptions into a new Rule 31(d)(9). This new provision meaningfully, yet thoughtfully, expands when corporate entities may represent themselves in Arizona.
- Revise exemptions that include both corporate and individual components to remove the corporate components (as they are covered by the new Rule 31(d)(9)) and to clarify the components applying to individuals remain unaltered.

Specifically, the general exemptions are currently those that appear in subparts 22 (constitutional), 23 (government officers and employees), 19 (court forms), 18 (non-lawyer assistants), 20 (documents

created in the regular course of business), 24 (certified legal document preparers), 25 (mediators), and 27 (lawyers licensed in other jurisdictions). Petitioner proposes to begin the exemption list with the general exemptions. Appendix A shows the renumbering of those exemptions as subparts 1-8, respectively, and shows the new, collective exemption for corporate self-representation as subpart 9.

Subparts 3, 4, 5, 6, 7, 9, 10, 11, 28, and 31, related to corporate self-representation, are consolidated in new subpart 9. After amendment, Rule 31(d)(9)—the new, collective exemption—would appear as follows:

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

...

9. A person who is not an active member of the state bar may represent any entity that is not an issuing public corporation, as that term is defined in A.R.S. § 10-2701, before any court in this state and in any proceeding, including but not limited to any quasi-judicial hearing, any administrative, agency, hearing officer, or board hearing, rehearing, or appeal, any small claims procedure or proceeding, and in any fee arbitration proceeding. For purposes of this rule, “any entity that is not an issuing public corporation” includes, but is not limited to, closely held corporations, limited liability companies, partnerships, non-profit corporations, public service corporations and interim operators appointed by the Arizona Corporation Commission, management companies,

and unincorporated associations. “Any entity that is not an issuing public corporation” does not include an individual, and the entity must specifically authorize such person to represent it in the particular matter; such representation must not be the person’s primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the person must not receive separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provisions, any presiding officer in any proceeding may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented. Any presiding officer may assess an appropriate sanction against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.

The revised corporate self-representation exemption broadens the situations when corporate entities may represent themselves but retains traditional safeguards against the ills of the UPL. Namely, any corporate entity that is not an issuing public corporation may be represented by “a person who is not an active member of the state bar” before any court and in any proceeding. Petitioner proposes excluding publicly traded corporations from the broadened exemption, as they have duties to others beyond those who have chosen expressly to organize themselves into that particular corporate entity.

The exemption was crafted with the canon of construction *ejusdem*

*generis*¹ in mind, as it further defines the terms “proceeding” and “any entity that is not an issuing public corporation” with references to non-exclusive classes of things that expressly include other things of the same kind or nature. The term “any entity that is not an issuing public corporation” excludes individuals.

Pursuant to the proposed exemption, the entity seeking to self-represent must have certain UPL safeguards in place. Those are:

- The corporate entity must have specifically authorized the person to represent it in the particular matter,
- The representation must be secondary or incidental to the authorized non-lawyer person’s other duties relating to the management or operation of the entity, and
- The authorized person must not receive separate or additional compensation for representing the corporate entity in the particular matter.

The proposed Rule 31(d)(9) exemption contains an additional justice system safeguard. “[A]ny presiding officer in any proceeding may require counsel in lieu of lay representation whenever it determines

¹ “*ejusdem generis* . . . [Latin ‘of the same kind or class’] (17c)” EJUSDEM GENERIS, Black’s Law Dictionary (10th ed. 2014).

that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties” that the authorized person represents.

Petitioner proposes further continuing the reorganization of Rule 31(d) by renumbering as subparts 10-16 the administrative-proceeding-related exemptions that currently appear as subparts 1 (Department of Economic Security/Department of Child Safety proceedings), 2 (employees in board or quasi-judicial personnel proceedings), 8 (Department of Health Services administrative appeals), 12 (Arizona Health Care Cost Containment System administrative appeal proceedings), 13 (administrative proceedings before various State agencies), 15 (federal free appropriate public education proceedings),² and 29 (landlord/tenant disputes before Arizona Department of Fire, Building and Life Safety).

Proposed renumbered subparts 17-22 are the existing tax-related exemptions in subparts 4 (small claims procedures in the Arizona Tax Court), 14 (State Board of Tax Appeals disputes involving less than \$25,000), 16 (authorized practice before the Internal Revenue Service),

² This subpart remains in its current place as Rule 31(d)(15), as other subparts were reorganized around it.

17 (authorized financial and tax advice and related documents), 21 (tax return preparation),³ and 26 (registered property tax agents).

Finally, current subpart 30 (licensed fiduciaries) is renumbered as a final exemption 23.

For good cause, including that of easing needless burdens on the courts and litigants and increasing access to justice, Petitioner asks this Court to revamp Rule 31(d) and adopt the amended form discussed above and shown in full in Appendices A and B to this Petition.

II. RULE 31(d) CURRENTLY CONTAINS THIRTY-ONE EXCEPTIONS, WITH VARIOUS SUBPARTS, MAKING IT DIFFICULT TO APPLY AND ADMINISTER.

From their inception, exemptions to Rule 31 focused on efficiencies for corporate entities and access to justice. And Arizona has provisions for non-lawyer representation in both Rule 31(d) and in the state constitution. *See* Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 PROF. LAW 79, 114-16 (2012) (citing Ariz. R. Supreme Ct. 31 and ARIZ. CONST. art. 26). Corporate self-representation was actually the impetus behind the very first exemption—adopted in 1979—from Rule 31’s general prohibition

³ This subpart remains in its current place as Rule 31(d)(21).

on anyone other than an active member of the State Bar representing another and engaging in activities that could be termed the practice of law. In a number of situations, it began to make economic sense to allow corporate self-representation and recognize corporate autonomy.

Rule 31(d)(3), Ariz. R. Supreme Ct., today provides that:

An officer of a corporation or a managing member of a limited liability company who is not an active member of the state bar may represent such entity before a justice court or police court provided that: the entity has specifically authorized such officer or managing member to represent it before such courts; such representation is not the officer's or managing member's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the entity was an original party to or a first assignee of a conditional sales contract, conveyance, transaction or occurrence that gave rise to the cause of action in such court, and the assignment was not made for a collection purpose.

Thus, corporate entities may represent themselves—through their managing members and officers—in justice or police courts, so long as (1) there is specific authorization by the entity, (2) the officer or member is not acting as a *de facto* in-house counsel, (3) the entity was an original party or initial assignee to the transaction or occurrence giving rise to the case, and (4), if the corporate entity is an assignee, then no collection purpose was had for the assignment. Petitioner seeks to

expand on this original exemption and promote the access-to-justice principles it embodies. As discussed below, the expansion is consistent with the modern trend of case law and previous Rule 31 amendments.

The Legislature⁴ added the original exemption to what was then A.R.S. § 32-267 in 1977. Many have been added since. Petitioner respectfully suggests the time has come to combine and streamline those exemptions in the interests of certainty, clarity, and judicial economy. Courts, parties, and counsel all will benefit from a reorganized, simplified, and clarified Rule 31. Rule 31 exemptions have sprouted persistently in a less-than-manicured field, but as the Executive Director of the Institute for the Advancement of the American Legal System has noted, the need for artful pruning has become more urgent:

The poorly tended field was the civil court system itself, where, for the last two decades, cases have indeed taken far too long to resolve and cost way too much. There is no world in which it would have made sense to take a \$600 claim to court, or even a \$6,000 claim. Many would argue that it would not even make sense to take a \$60,000 claim to court.

⁴ Prior to the early 1980s, the Arizona Revised Statutes included regulations on the practice of law in Title 32, along with the rest of the laws pertaining to professions and occupation. By 1981, the Arizona Supreme Court had exercised its constitutional rulemaking power and began to enact rules for lawyer regulation. *See* ARIZ. CONST. art. 6, § 5.

See Rebecca Love Kourlis, “Tending the Field: Bolstering the Courts to Compete with Arbitration,” November 4, 2015, *available at* <http://iaals.du.edu/blog/tending-field-bolstering-courts-compete-arbitration>. Those dollar amounts make far less economic sense for small Arizona corporate entities that Rule 31 forces to hire a lawyer to pursue such claims. In most cases, the amount in controversy would be spent before the complaint is fully drafted. This outcome is inconsistent with this Court’s Strategic Agenda for 2014-2019, entitled “Advancing Justice Together: Courts and Communities” (the Strategic Agenda). The first goal of the Strategic Agenda is to promote “access to justice as technology and our State’s population and economy continue to change.” Amending Rule 31(d) is a solid step in that direction.

III. THE PROPOSED AMENDMENTS DOVETAIL WITH THIS COURT’S CONTINUED FOCUS ON CLARIFYING AND SIMPLIFYING RULES TO INCREASE ACCESS TO JUSTICE.

This Court’s Strategic Agenda also includes as a significant item “the review of certain Arizona court rules to restyle, simplify, and clarify” them.⁵ *See* ADMIN. ORDER No. 2014-116, dated November 24,

⁵ *Available at* <http://www.azcourts.gov/portals/0/AdvancingJusticeTogetherSA.pdf>, at 6 (Agenda).

2014. In establishing the Task Force on the Arizona Rules of Civil Procedure, this Court said, “Arizona court rules require periodic review and revision to keep pace with technology, to accommodate changing case management systems, and to ensure that our courts are accessible to litigants, whether represented by counsel or self-represented.” *Id.* Though it has been amended 35 times in about as many years, a careful reading of Rule 31(d)’s exemptions demonstrates the need for a thorough review and revision. *See generally* Ariz. R. Supreme Ct. 31(d). Rule 31 should be revised to be more accessible to litigants, including corporate litigants, whether they are self-represented or have counsel.

As this Court noted in establishing its Committee on Civil Justice Reform, Arizona courts do not shirk from meaningful reforms accomplished via rule change. ADMIN. ORDER 2015-126, dated December 23, 2015. Indeed, Arizona’s judiciary has a long history of reform through rule changes, including the myriad changes to Rule 31. This Court has stressed that “[i]deas for further civil justice reforms should be informed by careful consideration of recent national efforts and studies.” *Id.* Given the trend in state and national case law, meaningful revisions to Rule 31—especially those promoting corporate self-

representation under the right circumstances—have become necessary.

IV. THE PROPOSED AMENDMENTS ARE IN LINE WITH STATE AND NATIONAL CASE LAW REFLECTING CORPORATE AUTONOMY.

Modern judicial trends expand corporate self-determination, including corporate self-representation. This trend, based in decisional and constitutional law, militates in favor of reforming Rule 31. *Cf. Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242 Ariz. 108, 117, ¶46 (2017) (Bolick, J., dissenting) (“Freedom of contract allows individuals to order their affairs and exchange goods and services, without coercion, in accord with their personal values and priorities.”).

The proposed changes to Rule 31 also honor the legal fiction of corporate personhood. Corporate entities may act only through the people who form them. The purpose of the legal fiction and the purpose of the proposed changes is to provide greater protections for human beings who both organize themselves into corporate entities and are subject to court rules, individually and as corporate entities. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

Further, this Court amended Rule 31 more than 30 years ago to specifically overrule appellate case law holding that lay employee who was not an agent under attorney supervision could not represent a

corporate employer before the Unemployment Insurance Appeals Board of the Department of Economic Security. *See* 1986 Amendment to Rule 31 (adding what now appears as Rule 31(d)(1) to allow a corporate employer to “represent itself through an officer or employee” and effectively overruling *Anamax Min. Co. v. Arizona Dep’t of Econ. Sec.*, 147 Ariz. 482 (App. 1985)); *see also* Suzannah R. McCord, Comment, *Corporate Self-Representation: Is It Truly the Unauthorized Practice of Law*, 67 ARK. L. REV. 371 (2014). This Court should continue the long-time trend of expanding corporate self-representation via rule change.

V. THE PROPOSED AMENDMENTS WOULD LESSEN BURDENS ON COURTS AND PARTIES.

The proposed changes to Rule 31 are not an end-run around the UPL rules and would not significantly increase risks that inspire the regulation of the practice of law. To the contrary, the proposed changes measurably would lessen burdens on courts and parties—the human beings involved in litigation—especially those parties that seek to represent themselves.⁶

The proposed changes align with this Court’s Strategic Agenda

⁶ The changes to Rule 31, Ariz. R. Supreme Court, proposed by this Petition require no corresponding changes to and have no untoward effects on Rule 8.1, Ariz. R. Civ. P. regarding commercial court cases.

goals. At least six goals relate to services for self-represented litigants prominently set forth under the Strategic Agenda's Goal One of Promoting Access to Justice. (Strategic Agenda, p. 2.) Access to justice "is advanced not only by examining legal representation for moderate and low-income persons, but also by helping self-represented litigants and others navigate the judicial process" *Id.* Arizona courts have worked extremely hard to provide services for self-represented litigants (SRLs)—i.e., to teach the skills and provide the tools necessary for people to represent themselves. The corporate entities in which people have chosen to organize themselves should not be left behind. Just as individuals may be priced out of our system of justice, so may small or less-well-funded corporate entities.

The judicial branch has expanded individual SRLs access to web-based forms and made court forms easily understandable for SRLs. Somewhat ironically, the main court form related to Rule 31 highlights the lack of access for corporate entities that seek to represent themselves and gives individual SRLs the tools to slam the courthouse door on those corporate entities. *See* 3 ARIZ. LEGAL FORMS, DEBTOR-CREDITOR § 9.39.2 "Motion to Strike Answer for Failure to Obtain

Counsel for [LLC] [Corporation]” (2d. ed. September 2017) (citing Rule 31 of this Court’s rules).

A common objection to allowing corporate entities to represent themselves is the flawed assumption that those corporate entities are doomed to lose. The current Rule 31 guarantees that outcome because it forecloses those corporate entities’ access to the courts. They lose by default because they, like many individuals, cannot afford to hire a lawyer. *See id.* This Court should amend Rule 31(d) to give them the chance to win. Is it not better for those corporate entities to have litigated and lost than to never have litigated at all? The proposed changes seek to remedy this situation.

VI. PAST CONCERNS ABOUT THE UPL MOTIVATED THE NOW-UNWIELDY RULE AND HAVE BECOME OUTMODED.

Because Arizona’s UPL regulations and the extension of self-representation rights to corporate entities claim the same purpose, marrying them as proposed makes sense. According to the State Bar of Arizona, the “purpose of the unauthorized practice of law system is to

protect the public.”⁷ The purpose of extending additional rights to corporate entities is to protect people who choose to organize themselves into a corporate form. As Justice Alito wrote in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014):

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations’ financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

The longstanding purpose of Rule 31’s subsections has been to increase access to justice and to decrease costs associated with participation in our justice system in a variety of settings. Nearly two decades ago, Petition R-99-0004 sought to add several exemptions related to administrative proceedings. Diverse and sophisticated

⁷ “Regulation of Non-Lawyers,” STATE BAR OF ARIZONA, *available at* <http://www.azbar.org/lawyerconcerns/regulationofnon-lawyers> (last accessed December 11, 2017).

Arizona corporate entities roundly supported the proposal. The Arizona Hospital and Healthcare Association said, “Injecting lawyers into the hearing process will do nothing to enhance the process . . . but will significantly increase healthcare providers’ administrative costs of participating in [the Arizona Health Care Cost Containment System].” (See Statement of Arizona Hospital and Health Care Association in Support of Proposed Changes to Rule 31, dated June 3, 1999, at 2.)


Petitioner respectfully submits the time has come to decrease the costs and burdens of litigation for self-represented corporate entities, such as small businesses. Re-envisioning Rule 31(d) as proposed in Appendix A would work toward exactly that.

VII. CONCLUSION

Rule 31(d)’s myriad exceptions, yet countless strictures, place courts and parties in a bind, stifling access to justice and corporate autonomy. Small business litigants, in particular, would benefit from an updated rule that improves access to justice and recognizes corporate autonomy. Given that, Petitioner urges adoption of the streamlined Rule 31(d) proposed for this Court’s consideration in Appendix A.

RESPECTFULLY SUBMITTED this 8th day of January, 2018.

HON. DAVID B. GASS

By 

Hon. David B. Gass
Judge of the Superior Court,
Maricopa County

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